

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:NR:DEN:POSTF-143717-02
WRDavis

date: **September 24, 2002**

to: SB/SE-Technical Support (EQMS), Denver, CO
TEFRA Coordinator Janice Mueller

from: Area Counsel
(Natural Resources:Houston)

subject:

[REDACTED]
EIN: [REDACTED]
Address: [REDACTED]
Proper Parties to Execute Forms 870-P for Partners in
[REDACTED] Limited Partnership for [REDACTED] Tax Year

STATUTE OF LIMITATIONS EXPIRES: September 30, [REDACTED]

This memorandum modifies our prior response of August 14, 2002, concerning your request for assistance dated August 8, 2002. This memorandum should not be cited as precedent.

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

ISSUES

1. Who should sign the Forms 870-P, Agreement to Assessment and Collection of Deficiency in Tax for Partnership Adjustments, on behalf of [REDACTED] Inc., as a partner of [REDACTED] L.P., so as to enter into a settlement agreement between that partner and the Service for the partnership's [REDACTED] taxable year, in conformance with I.R.C. § 6224(c)? Does a Form 870-P that identifies the taxpayer as [REDACTED] Inc, and is signed in the name of "[REDACTED]" by an officer of that company satisfy these requirements?

2. Who should sign the Forms 870-P on behalf of [REDACTED], as a partner of [REDACTED] L.P., so as to enter into a settlement agreement between that partner and the Service for the partnership's [REDACTED] taxable year, in conformance with I.R.C. § 6224(c)? Does a Form 870-P that identifies the taxpayer as [REDACTED], and is signed in the name of "[REDACTED]" by an officer of that company satisfy these requirements?

3. Who should sign the Form 870-P on behalf of [REDACTED] Inc., and [REDACTED], both of which were subsidiary members of the affiliated group of corporations for which [REDACTED] Inc., filed a consolidated return for the taxable year [REDACTED], as common parent and, pursuant to Treas. Reg. § 1.1502-77(a), the sole agent authorized to act for the subsidiary members of that affiliated group of corporations? Does a Form 870-P that identifies the taxpayer as "[REDACTED], formerly known as [REDACTED], and is signed in the name of [REDACTED]" by an officer of that company satisfy these requirements?

CONCLUSIONS

For each of the Forms 870-P, you should identify the Partnership as [REDACTED] L.P., using the EIN from [REDACTED] ([REDACTED]) as the Taxpayer Identifying Number. The tax year to which the forms apply is [REDACTED].

1. The Service should not obtain a Form 870-P from [REDACTED] Inc. (now known as [REDACTED] Inc.), since the parent company ([REDACTED], f.k.a., [sic] [REDACTED] Inc.) still has authority to bind [REDACTED] to the settlement. The Service should not deal with [REDACTED] directly to preserve this agency relationship. If the parent company has elected to have the provisions of Treas. Reg. 1.1502-77 apply, the Service must notify the parent of such dealings and the parent would no longer have agency authority over [REDACTED]. Treas. Reg. § 1.1502-77 generally applies for tax years beginning after June 28, 2002, not our situation here.

2. Since [REDACTED] is no longer in existence, [REDACTED] Inc., is liable as a state law successor for all debts and liabilities of [REDACTED], which includes its several liability for the consolidated tax of the [REDACTED] group. Accordingly, [REDACTED] Inc., is liable for any and all consolidated tax deficiencies resulting

from adjustments to the partnership items of the [REDACTED]
[REDACTED] L.P. for its [REDACTED] taxable year.

The caption of this Form 870-P should read as follows:

[REDACTED] Inc. (EIN: [REDACTED]), as successor to [REDACTED]
[REDACTED], partner of [REDACTED] L.P. (EIN: [REDACTED]) *

Put an asterisk after (EIN: [REDACTED]) above, and at the bottom of the Form 870-P, type the following:

This is with respect to [REDACTED] Inc.'s state law successor liability for [REDACTED]'s several liability for the consolidated tax of the [REDACTED] Inc. (EIN: [REDACTED]) and Subsidiaries consolidated group resulting from [REDACTED] Inc.'s and [REDACTED]'s partnership income as partners of the [REDACTED] L.P.

(b)(7)a



3. Since [REDACTED] Inc., formerly [REDACTED] Inc., is the surviving common parent to the [REDACTED] consolidated group for the [REDACTED] tax year, this corporation, as agent for the group, can bind the group for the partnership liabilities of its members by having an authorized corporate officer execute the Form 870-P captioned as follows:

[REDACTED] Inc. (EIN: [REDACTED]), now known as [REDACTED]
[REDACTED] Inc.) [REDACTED] *

Put an asterisk immediately after the word "Subsidiaries," and then at the bottom of the first page of the Form 870-P, type:

* This is with respect to the consolidated federal income tax liability of the [REDACTED] Inc. (EIN: [REDACTED]) [REDACTED] consolidated group resulting from [REDACTED] Inc.'s and [REDACTED]'s partnership income as partners of the [REDACTED] L.P.

On the second page, in the signature block, type the following:

[name of current officer]
[official position of current officer]
[REDACTED] Inc. (Formerly [REDACTED] Inc.)*

Put an asterisk immediately after "(. . . Inc.)" and at the bottom of that page, type:

* as the common parent agent for the [REDACTED] group, including [REDACTED] Inc. (EIN: [REDACTED]), now known as [REDACTED] Inc.) and [REDACTED] (EIN: [REDACTED]) who were partners of [REDACTED] L.P. (EIN: [REDACTED]).

(b)(7)a

[REDACTED]


FACTS

Please note that the reference to a "successor" of [REDACTED] Inc., contained in the final paragraph of the FACTS section of our prior memorandum, was in error. [REDACTED] Inc., does not have a "successor," it merely had a name change. Therefore, please treat this memorandum as modifying that fact. As corrected, the paragraph should read as follows:

From [REDACTED] until the time that the successor to the Partnership was merged into [REDACTED] L.P., an entity that elected to be treated as a corporation, [REDACTED] owned a [REDACTED]% interest in the Partnership, and [REDACTED] and its successor owned a [REDACTED]% interest in the Partnership. Additionally, [REDACTED] was, until its merger into [REDACTED], the tax matters partner of the Partnership.

Please contact the undersigned at (303) 844-2214, ext. 259,
if you have any further questions.

BERNARD B. NELSON
Area Counsel
(Natural Resources:Houston)

By: 
WILLIAM R. DAVIS, JR.
Attorney (LMSB)

**Office of Chief Counsel
Internal Revenue Service**

memorandum

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WRDavis

date: 8/14/2002

to: SB/SE-Technical Support (EQMS), Denver, CO
TEFRA Coordinator Janice Mueller

from: Area Counsel
(Natural Resources:Houston)

subject:

EIN: [REDACTED]

Address: [REDACTED]

Proper Parties to Execute Forms 870-P for Partners in
[REDACTED] Limited Partnership for [REDACTED] Tax Year

STATUTE OF LIMITATIONS EXPIRES: September 30, [REDACTED]

This memorandum responds to your request for assistance dated August 8, 2002. We provide the following as a supplement to our response of June 6, 2001¹, to clarify who should sign the Forms 870-P for partnerships in which two subsidiaries of [REDACTED] Inc., the predecessor to [REDACTED] Inc., were partners. The scope of these questions is set forth below. This memorandum should not be cited as precedent.

Please note that, as nondocketed significant advice, this advice is subject to a 10-day post-review by Chief Counsel National Office. Once this review has been completed, I will contact you to advise of its acceptance upon review, or of any modifications to the proposed response.

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

¹ That memorandum primarily concerned the proper person to extend the assessment statute by agreement and focused on the identity of the tax matters partner.

ISSUES

1. Who should sign the Forms 870-P, Agreement to Assessment and Collection of Deficiency in Tax for Partnership Adjustments, on behalf of [REDACTED] Inc., as a partner of [REDACTED] L.P., so as to enter into a settlement agreement between that partner and the Service for the partnership's [REDACTED] taxable year, in conformance with I.R.C. § 6224(c)? Does a Form 870-P that identifies the taxpayer as [REDACTED] Inc, and is signed in the name of "[REDACTED]" by an officer of that company satisfy these requirements?

2. Who should sign the Forms 870-P on behalf of [REDACTED], as a partner of [REDACTED] L.P., so as to enter into a settlement agreement between that partner and the Service for the partnership's [REDACTED] taxable year, in conformance with I.R.C. § 6224(c)? Does a Form 870-P that identifies the taxpayer as [REDACTED], and is signed in the name of "[REDACTED]" by an officer of that company satisfy these requirements?

3. Who should sign the Form 870-P on behalf of [REDACTED] Inc., and [REDACTED], both of which were subsidiary members of the affiliated group of corporations for which [REDACTED] Inc., filed a consolidated return for the taxable year [REDACTED], as common parent and, pursuant to Treas. Reg. § 1.1502-77(a), the sole agent authorized to act for the subsidiary members of that affiliated group of corporations? Does a Form 870-P that identifies the taxpayer as "[REDACTED]", formerly known as [REDACTED], and is signed in the name of [REDACTED] by an officer of that company satisfy these requirements?

CONCLUSIONS

For each of the Forms 870-P, you should identify the Partnership as [REDACTED] L.P., using the EIN from [REDACTED] ([REDACTED]) as the Taxpayer Identifying Number. The tax year to which the forms apply is [REDACTED].

1. [REDACTED] Inc., is the current name of [REDACTED] Inc., a partner that remains in existence. Because of this continued existence, Form 870-P should identify the taxpayer as:

[REDACTED] Inc., formerly [REDACTED]
Inc.

The form should reflect the EIN of [REDACTED] Inc. ([REDACTED]) as the Taxpayer Identifying Number for the taxpayer. The corporation should execute the consent with the following language identifying the authorized person and his/her capacity as follows:

[REDACTED] Inc. (EIN: [REDACTED]), formerly [REDACTED] Inc., partner of [REDACTED] L.P. (EIN: [REDACTED]), by <Authorized Representative's name and title of person signing agreement for [REDACTED] Inc.>

(b)(7)a

2. Since [REDACTED] is no longer in existence, Form 870-P should identify the taxpayer as:

[REDACTED] Inc., as successor to [REDACTED]

The form should reflect the EIN of [REDACTED] Inc. ([REDACTED]) as the Taxpayer Identifying Number for the taxpayer. The corporation should execute the consent with the following language identifying the authorized person and his/her capacity as follows:

[REDACTED] Inc. (EIN: [REDACTED]), as successor to [REDACTED] [REDACTED], partner of [REDACTED] L.P. (EIN: [REDACTED]), by <Authorized Representative's name and title of person signing agreement for [REDACTED]>

(b)(7)a

3. Since [REDACTED] Inc., formerly [REDACTED] Inc., is the surviving common parent to the [REDACTED] consolidated group for the [REDACTED] tax year, this corporation, as agent for the group, can bind the group for the partnership liabilities of its members by having an authorized corporate officer execute the Form 870-P with the following language:

[REDACTED] Inc. (EIN: [REDACTED]), formerly [REDACTED] Inc., by <Authorized Representative's name and title of person signing agreement for [REDACTED]>, as common

parent of [REDACTED] Inc. (EIN: [REDACTED]) and [REDACTED]
[REDACTED] (EIN: [REDACTED]), partners of [REDACTED]
[REDACTED] L.P. (EIN: [REDACTED]) *

At the bottom of the form, the footnote should read:

* This is with respect to the consolidated federal income
tax of the [REDACTED] (EIN: [REDACTED]) [REDACTED]
consolidated group for the group's taxable year ended
December 31, 1996.

(b)(7)a [REDACTED]
[REDACTED]

FACTS

[REDACTED] L.P. (EIN: [REDACTED]) ("Partnership") was
a limited partnership that was, for its tax year ended December
31, [REDACTED], subject to the unified partnership audit provisions,
set forth at I.R.C. § 6221 et seq. During that tax year, and
until [REDACTED], Partnership had two corporate partners:
[REDACTED] (EIN: [REDACTED]) ("[REDACTED]"),
and [REDACTED] Inc. (EIN: [REDACTED]) ("[REDACTED]"). Both of these
corporations were included in the [REDACTED] consolidated federal
income tax return filed by [REDACTED] Inc. (EIN: [REDACTED]) ("[REDACTED]").

On [REDACTED], pursuant to a change in ownership, [REDACTED]
[REDACTED] changed its name to [REDACTED] Inc. ("[REDACTED]").
It is our understanding that, other than the name change, the
corporate existence of [REDACTED] was not changed in any way
(i.e., no mergers with, or into, any other entities were effected
with the ownership change). If our understanding is incorrect,
please contact us immediately, as it may affect our advice.

Through [REDACTED] and until [REDACTED], [REDACTED] and later,
[REDACTED], directly owned [REDACTED]% of the outstanding stock of
[REDACTED], the first-tier subsidiary
corporation which directly owned [REDACTED]% of the outstanding stock of
[REDACTED]. Further, [REDACTED] owned all of the
outstanding common stock of [REDACTED].

On [REDACTED], [REDACTED] Inc. (EIN: [REDACTED]) ("[REDACTED]")
acquired all of the outstanding stock of [REDACTED]
[REDACTED] and elected to treat the acquisition under the provisions

of I.R.C. § 338(h)(10). Additionally, on [REDACTED], [REDACTED] was merged with and into [REDACTED] under section 368(a)(1)(A), with [REDACTED] surviving the merger.

Other changes occurring included the change in the Partnership's name from [REDACTED] L.P. to [REDACTED] L.P. on [REDACTED], and the subsequent merger of [REDACTED] L.P. into [REDACTED] L.P. on [REDACTED]. With that merger, [REDACTED] L.P. changed its name to [REDACTED] L.P., and thereafter elected to have the entity treated as an association taxable as a corporation.

Most significant in this analysis were the following changes:

1. On [REDACTED], [REDACTED]'s name was changed to [REDACTED] Inc.
2. On [REDACTED], [REDACTED] was merged with and into [REDACTED] in a transaction qualifying under section 368(a)(1)(A), with [REDACTED] surviving.

It should be noted that [REDACTED] is the common parent of a consolidated group of corporations.

From [REDACTED] until the time that the successor to the Partnership was merged into [REDACTED] L.P., an entity that elected to be treated as a corporation, [REDACTED] and its successor owned a [REDACTED]% interest in the Partnership, and [REDACTED] and its successor owned a [REDACTED]% interest in the Partnership. Additionally, [REDACTED] was, until its merger into [REDACTED], the tax matters partner of the Partnership.

ANALYSIS

1. Under section 6224(c), "[a] settlement agreement between the Secretary and 1 or more partners in a partnership with respect to the determination of partnership items for any partnership taxable year shall (except as otherwise provided in such agreement) be binding on all parties to such agreement with respect to the determination of partnership items for such partnership taxable year." With the exception of partners who are not "notice partners," as defined by section 6231(a)(8), 6224(c) does not provide a method for the tax matters partner to bind other partners to a settlement agreement. Based upon this, we believe that the partner is the proper party to enter into

such agreements. Here, the corporate partner still in existence (i.e., [REDACTED] Inc.) should execute the agreement.

You should identify this corporation as the taxpayer on the Form 870-P, and prepare it for an authorized representative of the corporate partner to execute the Form 870-P on its own behalf. The specific language that we recommend is set forth in the Conclusion section above.

2. [REDACTED], a Delaware corporation, merged with [REDACTED], an Oklahoma corporation, with [REDACTED] surviving the merger. In the Certificate of Ownership and Merger, [REDACTED] specifically resolved to "merge into itself its subsidiary, [REDACTED], and assume all of [REDACTED]'s obligations." Based upon our review of applicable laws regarding merger of either state, [REDACTED] became authorized to act with regard to the tax liabilities of [REDACTED] upon completion of the merger.

As was succinctly stated in Fitzsimmons v. Western Airlines, Inc., 290 A.2d 682, 685 (Del. Ch. 1972):

It is thus a matter of statutory law that a Delaware corporation may not avoid its contractual obligations by merger; those duties "attach" to the surviving corporation and may be "enforced against it." In short, the survivor must assume the obligations of the constituent.

If Delaware law controls, then the obligations of [REDACTED] automatically attached to its successor, [REDACTED], upon merger. Rem Indus., Inc. v. Commissioner, T.C. Memo. 1974-123, aff'd without opinion, 529 F.2d 516 (4th Cir. 1975).

In this case, you should identify the taxpayer as "[REDACTED] Inc., as successor to [REDACTED]", and obtain its consent through an authorized representative of [REDACTED], on Form 870-P, using the language recommended in the Conclusion section above.

3. Generally, when TEFRA partners are members of an affiliated group of corporations for which the common parent files a consolidated return during any tax year, the common parent must also consent to any agreement concerning its subsidiaries' partnership items. In this case, the common parent, [REDACTED], is still in existence, albeit with a different name, [REDACTED].

Treas. Reg. § 1.1502-77A(a) describes the scope of a common parent corporation's agency. There, with the exception of the consent of the members of the affiliated group to consent to filing a consolidated return as part of an affiliated group and other circumstances not relevant here, the regulation makes the common parent:

the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year.

Treas. Reg. § 1.1502-77A(a).

Thus, in order to comply with the consolidated return regulations, you should obtain the consent of the common parent of [REDACTED] Inc., and [REDACTED] for the [REDACTED] tax year, notwithstanding that section 6224(c) authorizes a partner to bind itself in a settlement agreement. The suggested language is set forth in the Conclusions section above.

Please contact the undersigned at (303) 844-2214, ext. 259, if you have any further questions.

BERNARD B. NELSON
Area Counsel
(Natural Resources:Houston)

By: _____
WILLIAM R. DAVIS, JR.
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copy to:
David Yager
Helga Youngman